Supreme Court, U. S.
FILED
MAR 31 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1398

HERBERT FINEMAN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HOWARD GITTIS
BARBARA E. ETKIND
RICHARD E. LEVINE
Twelfth Floor
Packard Building
Philadelphia, Pa. 19102
Attorneys for Petitioner, Herbert Fineman.

Of Counsel:
WOLF, BLOCK, SCHORR and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pa. 19102

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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The Petitioner, Herbert Fineman, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Third Circuit, entered February 1, 1978, rehearing denied March 2, 1978.

OPINIONS BELOW

The unreported opinion of the Court of Appeals and the opinion of the District Court for the Eastern District of Pennsylvania, which is reported at 434 F. Supp. 197 (1977), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on February 1, 1978. A timely petition for rehearing was denied on March 2, 1978, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the jury instruction approved in this criminal case to the effect that immunity might *enhance* the credibility of a witness, in the face of conflicting decisions by other courts of appeals that immunized testimony should be viewed with caution or suspicion, and in the context of the ever increasing reliance by the Government upon immunized testimony, demonstrates a need for this Court to establish a uniform minimum cautionary instruction concerning the credibility of immunized witnesses.

2. Whether the Court below departed egregiously from the accepted and usual course of judicial proceedings by affirming a conviction for obstruction of justice where the jury was instructed that the defendant might be convicted even if the jury believed his unequivocal testimony that he did not intend subjectively or by his acts or words to cause an obstruction of justice.

STATUTE INVOLVED

18 U.S.C. §1503 provides, in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On January 28, 1977, a Grand Jury returned a ten-count indictment charging Petitioner, then Speaker of the House of Representatives of the Commonwealth of Pennsylvania, with profiting from his office by receiving money for recommending applicants to medical schools and by endeavoring to conceal that activity from the Federal Grand Jury and investigators. Specifically, the indictment charged a violation of the Federal Racketeering Statute, 18 U.S.C. §1961, *et seq.* (RICO) (Count I); conspiracy to violate that statute (Count II); mail fraud in the perpetration of such violation (Counts III-V); obstruction of a criminal investigation (Count VI); and certain obstruction of justice counts including alleged requests of Martin Abrams, chief government witness, to plead the Fifth Amendment (Count VII) and testify falsely before the Grand Jury (Count VIII), an alleged request of E. Craig Sweeten, an official of the University of Pennsylvania, to destroy a letter of recommendation (Count IX), and an alleged request of Harold Salkind, a consultant to the Philadelphia College of Osteopathic Medicine (PCOM), to withhold certain testimony from a Federal Grand Jury (Count X).

At the close of the Government's case, the trial court entered judgments of acquittal on Counts VI and VII. On May 20, the jury found Petitioner not guilty of all charges on Counts I through V, and VIII, thereby acquitting him of asking for or receiving any money in connection with any medical school recommendation. He was found guilty of the two obstruction charges involving the alleged requests of E. Craig Sweeten and Harold Salkind, and sentenced to two years imprisonment and fined $5,000 on each count, said sentences to run concurrently.

The trial, which commenced on May 9, 1977, involved two days of jury selection, seven days of testimony and two days of closing speeches, jury charges and deliberation.

The government's case covered approximately 700 pages of transcript, of which 660 pages are devoted to evidence going solely to the charges of which Mr. Fineman was acquitted. A total of 40 pages of record evidence was offered in support of the obstruction charges of which he was convicted.

Subsequent to trial, Petitioner appealed to the Court of Appeals for the Third Circuit on a number of grounds, foremost among which were instructional errors concerning the credibility of immunized witnesses and the necessity for a finding of intent under 18 U.S.C. §1503.

REASONS FOR GRANTING THE WRIT

1. The Jury Instruction Approved in this Criminal Case to the Effect that Immunity Might Enhance the Credibility of a Witness, in the Face of Conflicting Decisions by Other Courts of Appeals that Immunized Testimony Should Be Viewed with Caution or Suspicion, and in the Context of the Ever Increasing Reliance by the Government Upon Immunized Testimony, Demonstrates a Need for this Court to Establish a Uniform Minimum Cautionary Instruction Concerning the Credibility of Immunized Witnesses.

Count X charged Petitioner with obstructing justice by causing Harold Salkind, a consultant to the President of PCOM, to withhold relevant and material testimony from the Grand Jury. Salkind, an admitted and accomplished medical school fixer and tax cheat,[1] was the prosecution's chief witness on Count X. In return for his testimony, Salkind was immunized by the prosecution.

In the course of his testimony, Petitioner stated that Salkind had told him that the sole reason for his testimony was to "get himself [Salkind] out from under it." Petitioner further testified that in his discussion with Salkind, Salkind acknowledged that he would testify to certain untruths concerning Petitioner at the request of the government, in an effort to "save his own skin."

Not surprisingly, Petitioner's defense to Count X rested in large part upon an attack on Salkind's credibility, a primary thrust of which was the fact that Salkind was testifying under a grant of immunity. The trial court in its charge, however, not only totally blunted the force of that

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1. At trial Salkind admitted to collecting over $70,000 in bribes for himself and $200,000 "or better" for Dr. Frederic Barth, former President of PCOM, deceased prior to the date of trial.

attack but, indeed, turned it against the defense, instructing the jury that a grant of immunity could somehow "enhance" a witness' credibility. (The text of this charge is set forth in full in Appendix D attached hereto.)

The trial court first suggested that an immunized witness need not worry about prosecution and that, therefore, his credibility might well be enhanced by this freedom. Secondly, the court pointed out that a witness under immunity is not immune from being punished for perjury and, therefore, that,

> . . . the argument can be made since the witness under a grant of immunity is free to tell the truth, and the only problem he would have would be that if he lied he might be prosecuted for perjury that those facts tend to enhance the credibility of a witness testifying under a grant of immunity.

After expounding these two separate rationales as to why an immunized witness might be super-credible, the trial court briefly pointed out that a witness might testify under a grant of immunity "out of some motive to ingratiate himself with the authorities or to curry favor with them; and this motivation may cause you to regard his testimony as unreliable." This short nod to fairness occupied less than one-third of the space taken by the court's prior instruction on super-credibility. Lest Petitioner take some small degree of comfort from the latter instruction, the trial court immediately charged as to its recollection of the evidence:

> I do not recall any evidence in this case to the effect that any witness was granted immunity in exchange for his willingness to testify in a particular way.

This, despite the testimony of Petitioner that Salkind had told him he was testifying to "save his own skin"!

This totally inappropriate instruction, taken in tandem with the trial court's mischaracterization of the evidence, not only flies in the face of both the dictates of logic and the relevant case law, but amounted to an endorsement by the bench of the witness' testimony.[2] The instruction, now approved by the Third Circuit, stands in stark opposition to the immunity charges recently upheld by other federal courts of appeals. It is the antithesis of the strong, unequivocal immunity instruction upheld by the District of Columbia Circuit:

> You are instructed that one who testifies under a grant of immunity with a promise from the Government that he will not be prosecuted is a competent witness and you may convict a person accused of crime upon the uncorroborated testimony of such a witness, if you believe that testimony proves the guilt of the defendant beyond a reasonable doubt.
>
> However, such a witness' testimony should be examined by you with greater car [sic] than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interest, for *such a witness, confronted with the realization that he can procure his own freedom by incriminating another, has a motive to falsify.*
>
> *You should receive such testimony with suspicion* and act upon such testimony with caution.

---

2. The trial court's comments concerning perjury are totally inexplicable, since *every* witness, immunized or not, is equally obligated to tell the truth by virtue of the oath he takes and is equally subject to being charged with perjury for having testified falsely.

United States v. DeLoach, 530 F.2d 990, 994, n.5 (D.C. Cir. 1975), *cert. denied*, 426 U.S. 909 (1976) (emphasis supplied).

Even the more moderate cautionary instruction which the Seventh Circuit has endorsed points up clearly the flaws of the instant instruction:

> The testimony of a witness who provides evidence against a defendant for immunity from punishment or prosecution must be examined and weighed with greater care than the testimony of an ordinary witness. The jury must determine whether such a witness's testimony has been affected by the grant of immunity.

United States v. Rajewski, 526 F.2d 149, 160 (7th Cir. 1975), *cert. denied*, 426 U.S. 908; *United States v. Demopoulos*, 506 F.2d 1171, 1179 (7th Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

The instruction approved in the present case is not cautionary. It directs neither "suspicion" nor "greater care." Rather, it tilts dramatically in favor of the *prosecution* by emphasizing the power of immunity to *enhance* credibility. Thus, not only does the instruction upheld below predispose the jury to accept uncritically the testimony of the immunized witness, but, when combined with the court's mischaracterization of the evidence, it stands somewhere between a suggestion and a command to the jury to do just that.[3] The egregious nature of the error which the trial court committed in so instructing the jury unequivocally demonstrates the need for this Court to establish a

3. It has long been recognized that a "suggestion from the bench may well have a dispositive impact on the jury." See *Starr v. United States*, 153 U.S. 614, 626 (1894), and *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

uniform standard for instructions in this crucial and increasingly important area of criminal procedure.

The widespread prosecutorial employment of immunity is a relatively recent phenomenon. Since the authorization of use immunity by the Organized Crime Control Act of 1970, 18 U.S.C. §6001, *et seq.*, subsequently upheld by this Court only as recently as 1973 in *Kastigar v. United States*, 406 U.S. 441, immunity has become one of the federal prosecutor's most important and effective tools. By means of the pattern described below, the immunity device produces testimony necessary for conviction in a countless number of cases.

The typical pattern, of which the present case is a prime example, is the following: A witness seeking immunity is a witness with his own legal difficulties and, therefore, a witness with a powerful incentive to "save his own skin." Immunity will often be the only hope for such a witness, but a prosecutor will not grant immunity without a *quid pro quo*, i.e., inculpatory testimony against some other, generally "bigger" or more glamorous target of the investigation. The "incentive to prevarication" is obvious and has been noted by the federal courts. See *United States v. Leonard*, 494 F.2d 955, 961, n. 11 (D.C. Cir. 1974).

The "bargaining" process inevitably escalates the standard of accusation as the prosecutor will generally attempt to extract all the "cooperation" he can get before conferring immunity. Whether or not the prosecutor is knowingly soliciting exaggerated testimony, a witness, in trouble and seeking a way out, may well believe that he must offer it.

Contrary to the view of the world expressed by the trial court below and affirmed by the Third Circuit, immunity only "enhances" the credibility of the *prosecutor's* version of the truth. A witness who has successfully bargained for immunity knows that the prosecutor granting

immunity is the same prosecutor administering the perjury statutes. The immunized witness locks himself into a story to which he feels compelled to adhere, since the government has based its case upon his testimony. His motivation is to offer testimony which the prosecutor believes is true, or which the prosecutor believes will bolster the government's case. An immunized witness needs no warning concerning the danger of deviation from his script. Thus, the "incentive to prevarication" is a grim reality; one which has prompted other federal courts to instruct juries to exercise extreme caution, and even "suspicion" as to the immunized testimony. The trial court below and the Third Circuit, by its affirmance of that court's charge, totally ignored that reality and thereby dealt a fatal blow to Petitioner's defense on Count X.

Since *Kastigar, supra*, immunity has become an enormous boon to federal prosecutors, providing them with incriminating evidence in countless cases. Further, the procedure for granting immunity and obtaining such evidence is a standardized one producing easily identifiable and totally predictable results. Despite these facts, and despite the further fact that such results take the form of inherently suspect testimony, there has developed no uniformity in regard to the substance of instructions given by federal trial courts as to the credibility of such testimony. While it is generally recognized that *some* type of cautionary instruction must be given at the request of a defendant against whom such suspect testimony is directed, the action of the Third Circuit in the instant case makes glaringly apparent the continuing lack of understanding of the immunized witness phenomenon and the need for direction as to a uniform approach to cautionary jury instructions mandated by that phenomenon.

As stated above, the District of Columbia Circuit requires that immunized testimony be received "with suspicion." The Seventh Circuit mandates that such testimony be weighed "with greater care" than other testimony. The

instruction approved in the present case, on the other hand, emphasizes the curative powers of immunity, creating for the jury the impression that an immunized witness is somehow more worthy of belief than a witness without immunity. Such a prosecution-biased charge deprives the criminal defendant of any opportunity to put before the jury the appropriate considerations necessary to make a reasoned judgment on the basis of immunized testimony.

The egregious instructional error committed below could not have taken place but for the failure of the federal courts to develop a minimum standard for cautionary instructions regarding the credibility of immunized witnesses. The burgeoning employment of immunity as a prosecutorial tool makes imperative the development of such a minimum standard. Further, the uniformity of the immunity granting procedure, as well as the total predictability of its results, creates a particularly appropriate context in which this Court might establish a minimum standard which would provide at least a modicum of desperately needed fairness and uniformity. By granting certiorari in this case and by condemning the instruction at issue herein, this Court can begin to provide much needed guidance for the federal courts on what is daily becoming a more crucial concern.

II. The Court Below Departed Egregiously from the Accepted and Usual Course of Judicial Proceedings by Affirming a Conviction for Obstruction of Justice Where the Jury Was Instructed that the Defendant Might Be Convicted Even if the Jury Believed His Unequivocal Testimony that He Did Not Intend Subjectively or by His Acts or Words to Cause an Obstruction of Justice.

Count IX charged Petitioner with obstructing justice by "causing" E. Craig Sweeten, an official of the University

of Pennsylvania, to destroy a letter of recommendation allegedly submitted by Petitioner's office and contained in the University's files. The obstruction of justice statute, 18 U.S.C. §1503, requires, as an essential element, a "corrupt endeavor." It has been repeatedly held, both by this Court and the various courts of appeals, that in order to establish a violation of §1503, the prosecution must prove "specific intent to impede the administration of justice. . . ." *United States v. Ryan*, 455 F.2d 728, 734 (9th Cir. 1972), citing *Pettibone v. United States*, 147 U.S. 197 (1893).

Petitioner testified that approximately two weeks prior to his discussion with Mr. Sweeten, Martin Abrams, the government's chief witness on the substantive bribery charges, had threatened to blackmail Petitioner, mentioning specifically a letter in the files of the University of Pennsylvania. Petitioner further testified that he had no recollection of such a letter and, in a state of "anguish" he later sought out Mr. Sweeten in an effort to discover whether such a letter indeed existed.

Under questioning by defense counsel, Petitioner clearly testified that he neither asked Mr. Sweeten to remove the letter from the files *nor did he intend* to convey the impression that he desired the letter removed. Furthermore, during the government's cross-examination, the following exchange took place:

> Q. (By Mr. Lieberman): Now after this meeting where Mr. Abrams shook you down, you contacted your friend at the University of Pennsylvania, Mr. Sweeten; is that correct?
> A. (By Mr. Fineman): I saw him two weeks later.
> Q. And the purpose of that meeting, was it not, sir, to have Mr. Sweeten remove a letter from the Braunstein file that was in the Penn Veterinary school?
> A. No. The purpose that [sic] meeting was essentially to make an inquiry of Mr. Sweeten as to whether

> or not there was a letter of my office to the Veterinary School on behalf of a student by the name of Braunstein.
> Q. Well, what did you hope to do with that information?
> A. I wanted to know whether or not we had written because I had no recollection of the case. There was no correspondence in my office. And I didn't know what Mr. Abrams was about when he told me he had gotten a letter from my office on Braunstein.
> Q. Well, suppose Mr. Sweeten had said to you, "Yes, Herb, there is a letter on Braunstein in our files"; what would you have done?
> A. I don't know what I would have done, Mr. Lieberman, I was deeply apprehensive, as I explained this morning. I felt absolutely positive that Mr. Abrams was going to involve me. I don't know what I would have done. . . .
> Q. Now is it your testimony that you never intended Craig Sweeten to remove that letter and destroy it?
> A. That is right.

Despite such unequivocal testimony, which, if believed, made out a complete defense to the §1503 charge, the trial court instructed as follows:

> Now, I am going to try to make a fine distinction with respect to certain of the counts in this case. Let me just be very emphatic by saying that if you accept the testimony of the defendant, if you believe that he is telling the truth, then you should acquit the defendant as to all of the counts, all of the charges included in the *first count, second count, third count, fourth count,* and *fifth count.* Also, if you accept the defendant's testimony you should acquit under the *eighth count* and the *tenth count.*

> *The only remaining issue, then, would be with respect to the ninth count which involved this alleged request of Mr. Sweeten to remove and destroy the Braunstein letter.* [Emphasis added.][4]

The trial court thus charged that Petitioner could be convicted *even if his testimony were believed;* testimony which completely negated an essential element of the offense. The full scope of the trial court's misapprehension of the law became apparent when that court responded to defense counsel's exception to the offending instruction:

> You want me to change the defendant's testimony for you?

Other federal courts of appeals have consistently recognized that instructions which remove the issue of intent from the jury mandate reversal. See, *e.g., United States v. De La Barra,* 447 F.2d 193, 195 (5th Cir. 1971); *United States v. Christmann,* 298 F.2d 651 (2d Cir. 1962); and *United States v. Sullivan,* 178 F.2d 723 (D.C. Cir. 1949). The Third Circuit, however, in the instant case, glossed over the grievous error committed by the trial court in opining that the charge "required a finding that Fineman intended to conceal the letter from the Federal Grand Jury." Such an interpretation of the instruction at issue simply cannot be supported. The trial court did *not* require a finding of specific intent but, on the contrary, *assumed* such a finding and, therefore, neglected entirely its duty to instruct the jury as to Petitioner's primary defense.[5]

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4. The text of this charge is set forth in full in Appendix E attached hereto.

5. The balance of the trial court's instruction on Count IX concerned a secondary defense regarding motive; i.e., whether Petitioner's concern with the letter was borne of a desire to obstruct the investigatory process or merely of the desire to prevent possible embarrassment to himself and his family as a result of Abrams' blackmail threat.

Reference to the above-cited cases clearly illustrates just how far the instruction had departed from the accepted and usual course of judicial proceedings. By erroneously and arbitrarily removing Petitioner's primary defense to Count IX, the trial court, in effect directed a verdict for the Government and worked such a manifest injustice upon the Petitioner as to require the intervention of this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit on the questions presented herein.

Respectfully submitted,

HOWARD GITTIS
BARBARA E. ETKIND
RICHARD E. LEVINE
Attorneys for Petitioner, Herbert Fineman.

Of Counsel:
WOLF, BLOCK, SCHORR and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pa. 19102

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

HERBERT FINEMAN

CRIMINAL

No. 77-36

MEMORANDUM AND ORDER

FULLAM, J. June 2, 1977

In a ten-count Indictment returned January 28, 1977, the defendant Herbert Fineman, then Speaker of the House of Representatives of the Pennsylvania General Assembly, was charged with violations of the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. §1962(c), conspiracy, mail fraud, interference with a federal investigation, and obstruction of justice, all in connection with the alleged receipt of bribes for the use of his official influence to obtain favorable action upon applications for admission to certain graduate schools of state-supported universities.

The jury trial commenced May 9, 1977. Two counts of the Indictment were dismissed at the close of the Government's case. On May 20, 1977, the jury rendered its verdict, finding the defendant guilty on two counts of obstruction of justice, and not guilty on all remaining counts. Post-trial motions challenging the convictions were argued on May 31, 1977.

The RICO, conspiracy, and mail fraud counts rejected by the jury were based upon allegations that, on at least four occasions between 1970 and 1973, parents of students

desiring to enroll in certain medical and veterinary schools paid large sums of money to one Martin Abrams, in order to obtain favorable action on the respective applications. The parents did not know what was to become of the money, except that it would be returned to them if the student in question was not admitted to the particular graduate school. Abrams testified that he paid most of the money to the defendant. The defendant denied ever receiving any money from Abrams or anyone else in connection with such applications. While admitting that, in each of the four instances, the defendant or some member of his staff had written a letter of recommendation to the graduate school in support of the application, the defense produced evidence to the effect that literally hundreds of such letters were written by the defendant or his staff, and that many other members of the legislature also wrote such letters, as a routine service to their constituents. The Government sought to establish that, in cases where the Government claimed the defendant was being paid, the letters of recommendation differed from the routine letters in their form, content, tone, or distribution.

However, the only direct evidence of payment to the defendant in these cases was the testimony of Abrams. When Abrams was first called before the Federal Grand Jury, he pleaded the Fifth Amendment. After being granted testimonial immunity, Abrams initially denied receiving any money from any of the parents, whereupon he was indicted for perjury, and entered a guilty plea to that charge. As part of a plea arrangement for a probationary sentence, and after being placed in a witness protection program because of alleged threats unconnected to the present case, Abrams again went before the Grand Jury, implicating the defendant and others, and testified as a Government witness at the defendant's trial. The reliability of his testimony was further undermined by his freewheeling admissions to a number of other criminal offenses, including bribery not involving the defendant, income tax

evasion, false income tax returns, etc.; and by the fact that for several years he had enjoyed a standard of living involving expenditures seemingly in excess of his relatively modest earnings from legitimate pursuits.

The Government sought to bolster Abrams' credibility in this instance by proof of a conversation, recorded without Abrams' knowledge before he decided to cooperate with the Government, between Abrams and one Gagliardi, who was acting as a Government informant. In the course of that conversation, Abrams told Gagliardi that the defendant had been the recipient of large sums of money in connection with graduate school admissions, and discussed ongoing arrangements whereby the defendant was paying Abrams' legal fees.

In late March of 1976, the local office of the Federal Bureau of Investigation received a "tip" concerning Fineman's alleged involvement with medical school admissions. This information was turned over to the Office of the Special Prosecutor, a state agency which was then conducting an investigation of the matter. So far as the record discloses, there was no federal investigation until some time in June or July of 1976.

The defendant's convictions on Counts IX and X of the Indictment stemmed from his activities during 1976, when, according to the Government, he attempted to conceal from the Federal Grand Jury his involvement with the questioned transactions. In Count IX, the defendant was charged with causing a vice-president of the University of Pennsylvania, in August of 1976, to remove from the files and destroy a letter of recommendation written by the defendant on behalf of an applicant named Braunstein for admission to that university's School of Veterinary Medicine. In Count X, the defendant was charged with having, on various dates in November and December of 1976, urged one Harold Salkind, who had been subpoenaed to testify before the Federal Grand Jury, to withhold information from the Grand Jury concerning certain trans-

actions involving admissions to the Philadelphia College of Osteopathic Medicine. The evidence as to each of these counts will now be summarized briefly:

As to Count IX, there was evidence from Abrams to the effect that he initially agreed not to implicate Fineman in exchange for the defendant's payment of Abrams' legal fees, and in the hope that the defendant would enable Abrams to "better himself" in the years ahead; and that he kept the defendant informed as to the nature of the Grand Jury's inquiries. The defendant, on the other hand, testified that his interpretation of his conversations with Abrams was that Abrams was threatening to implicate the defendant (falsely) unless the defendant paid $5,000 for Abrams' legal fees; that he refused to make any such payment; but that, as a result, he felt vulnerable to adverse publicity in the event Abrams carried out his veiled threats. Abrams had mentioned the names of two of the students, Conti and Braunstein, whose parents had paid Abrams large sums of money, and told the defendant that he, the defendant, was "involved" since he had written letters of recommendation for these men. The defendant thereupon promptly checked his office records, but could find no reference to Braunstein. He then asked his friend, E. Craig Sweeten, Vice-President of the University of Pennsylvania, to have the files of the veterinary school checked to see whether there was any such letter. Mr. Sweeten testified that the defendant met with him, told him that if there was a sponsoring letter for Braunstein it could be exceedingly embarrassing to the defendant, and requested Sweeten to cause any such letter to disappear, or words to that effect.

The defendant denied having expressly requested Sweeten to destroy the letter. He stated his primary purpose was to ascertain whether or not there was such a letter. He admitted, however, that he was in a state of panic and "anguish;" that he emphasized to Mr. Sweeten how very embarrassing such a letter might prove to be if

it existed; that he does not know what he would have said if the existence of such a letter had been confirmed; and that he can readily understand that Mr. Sweeten may have interpreted the defendant's words and facial expression as constituting a request for the destruction of the letter if found. The defendant admitted receiving word from an associate of Sweeten a few days later that the Braunstein matter had been "taken care of" but said he interpreted that as meaning that no letter had been found.

As it happened, the letter in question, which was in a rather forceful vein, was written on behalf of two students, Braunstein and a relative of the defendant. As a result of Mr. Sweeten's intervention at the defendant's request, the copy of the letter was removed from the Braunstein file and destroyed, but the original remained in the file of the other student, and was ultimately produced before the Federal Grand Jury in response to a subpoena, at which time the removal of the copy from the Braunstein file came to light

With respect to Count X, there was evidence that one Harold Salkind, an accountant and a "consultant" to the President of the Philadelphia College of Osteopathic Medicine had, over a period of years, been active in obtaining large "donations" to the college from parents of students seeking admission there. He testified that he had channeled upwards of $200,000 to Dr. Barth, the deceased former president of the college, in this manner, and had kept upwards of $75,000 for himself over the years. He testified that he was friendly with the defendant's father, and also with the defendant, and that on two occasions in 1967 and 1968, the defendant had been involved in such transactions. Salkind further testified that on both occasions, pursuant to arrangements suggested by Dr. Barth, the defendant delivered to Salkind substantial sums of cash, on behalf of the parents of prospective students, and that in response to Salkind's inquiries, the defendant stated

that he himself already had been "taken care of."[1] In addition, there was evidence of Salkind's involvement with more recent transactions with Abrams (but a dispute in the evidence as to how much money each man received). In late March of 1976, Salkind was subpoenaed to appear before a State Grand Jury. He mentioned that fact to the defendant during a chance encounter, and told the defendant that he planned to assert his Fifth Amendment privilege.

The new president of the Philadelphia College of Osteopathic Medicine, Dr. Rowland, testified that shortly thereafter the defendant asked him to obtain a list of students at the college for whom the defendant had written letters of recommendation. The defendant came to Rowland's office to obtain the list, and requested Rowland to destroy all such letters of recommendation from the defendant. According to Rowland, over a period of two or three months thereafter, Salkind, on several occasions, relayed to Rowland the defendant's request that these letters be destroyed, and sought assurance that they had been destroyed.

The defendant, in his testimony, admitted the visit to Dr. Rowland and the request for destruction of his letters (although he was under the impression that there was only one such letter). According to the defendant, about a week after his conversation with Salkind, he wrote another letter of recommendation for an applicant to the Philadelphia College of Osteopathic Medicine, but upon reflection, immediately thereafter concluded that any public official whose name might be linked to Salkind's activities would be the target of unfavorable publicity. He thereupon attempted to protect himself from that eventuality by asking that any letters from him be removed from the college files and destroyed. It should be noted that the

1. As discussed in Part II below, these transactions were not the subject of any of the counts of the Indictment in this case.

defendant was initially charged, in Count VI of the Indictment, with obstructing a federal investigation in violation of 18 U.S.C. §1510, by reason of these activities; but that charge was dismissed because of the Government's inability to prove that there was an actual federal investigation at the time the letters were destroyed.

At a social gathering in November of 1976, Salkind told the defendant that he had been summoned before a Federal Grand Jury, and was to be granted immunity, and that he intended to tell the complete truth, including revelation of the defendant's involvement in the 1967-68 transactions. On several occasions thereafter, according to Salkind, the defendant pleaded with him to omit from his testimony any reference to the defendant. It was these efforts which led to the defendant's conviction on Count X.

In his testimony, the defendant admitted urging Salkind to "keep me out of it," but only because any such testimony by Salkind would have been utterly false. It was the defendant's position that Salkind was proposing to furnish untrue testimony concerning the defendant in order to assure himself of immunity from prosecution.

I. Motion in Arrest of Judgment

The defendant seeks dismissal of Count IX on the ground that, while the evidence was sufficient to permit a reasonable jury to conclude that the defendant corruptly sought and obtained the destruction of the Braunstein letter, it is clear from the record that, at that time, the Braunstein file had not been subpoenaed by the Grand Jury. I perceive no merit to this argument. A person who knows that a Federal Grand Jury is investigating certain possible violations of federal law, and who has reason to believe that a certain incriminating document is likely to come to the Grand Jury's attention, and who intentionally causes the destruction of that document in order to prevent

it from falling into the hands of the Grand Jury, may, in my opinion, properly be convicted of obstruction of justice under 18 U.S.C. §1503. The statute proscribes conduct which "corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice. . . ."

What must be shown by the Government in the circumstances of the present case is that the Federal Grand Jury was duly empanelled and engaged in the "administration of justice," and that the defendant corruptly sought to impede the Grand Jury's efforts. *U.S. v. Walasek*, 527 F.2d 676 (3d Cir. 1975).

The evidence in this case permitted the jury to find that, shortly after a street-corner rendezvous between the defendant and Abrams, in connection with which the defendant concealed his true identity from a third party, and in which the defendant learned that Abrams had been granted immunity, and in which the defendant agreed to pay Abrams' counsel fees, the defendant requested a meeting with Mr. Sweeten, met him on a street corner the very next day, and with "anguish" on his face, requested the destruction of a letter which linked the defendant to one of the transactions in which Abrams collected bribe money. Under these circumstances, the fact that the defendant "reached" the Braunstein letter before the Grand Jury did cannot preclude his conviction for obstructing justice. The Motion in Arrest of Judgment will be denied.

II. Motion for Severance

A principal contention of the defense in this case has been that the obstruction counts should have been severed from the remaining counts in the Indictment. Before trial, the defendant filed a Motion under Fed. R. Crim. Proc. 14 for relief from prejudicial joinder, but the Motion was denied. The Motion was renewed in the course of the trial, and was supplemented by the further contention that

joinder of Count X was in violation of Fed. R. Crim. Proc 8(a). I am persuaded that there is no merit in either contention.

The defendant virtually concedes that Count IX was properly joined under Rule 8(a), and could properly be tried at the same time as the preceding eight counts of the Indictment. As I observed in ruling on the pretrial motion, virtually all of the evidence admissible in a joint trial of the first nine counts of the Indictment would be equally admissible if Count IX were tried separately. And, notwithstanding the earnest arguments of the defense to the contrary, I believe the same conclusion is applicable to Count X.

The defendant's argument is a somewhat technical one. The RICO, mail fraud, and conspiracy counts concerned the defendant's alleged activities with Abrams during 1970-73. Count X charges the defendant with urging Mr. Salkind to conceal from the Grand Jury transactions between the defendant and Salkind which occurred in 1967 and 1968, and thus were not alleged to have been part of the conspiracy, racketeering enterprise, or fraudulent scheme referred to in the first eight counts. Thus, it is argued, the Salkind transactions are entirely separate matters, and the jury which tried the Abrams issues should have been entirely insulated from all evidence relating to Salkind.

I do not believe it is possible to compartmentalize the evidence in this case quite so neatly. It must be remembered that both the Salkind incidents and the Abrams incidents related to admissions to the Philadelphia College of Osteopathic Medicine, and that Salkind was involved in transactions with both the defendant and Abrams. More importantly, the Grand Jury was investigating the entire situation. Evidence that the defendant sought to prevent the Grand Jury from learning of his transactions with Salkind involving the Philadelphia College of Osteopathic Medicine would also, necessarily, reflect the defendant's

desire to conceal his involvement in the admission practices of that institution. A jury could properly conclude that the defendant's motivation, in urging Salkind to withhold information, was not merely to protect himself from embarrassing disclosures of instances not the subject of any criminal charge but also to conceal his involvement with Abrams in the more recent incidents which were the subject of the charges in other counts of the Indictment. Indeed, the defendant himself testified that it was his conversation with Salkind in March of 1976 which prompted him to seek removal of all of his letters of recommendation from the files of the Philadelphia College of Osteopathic Medicine.

In short, I am satisfied that there was no misjoinder under Federal Rule of Criminal Procedure 8(a), and no prejudicial joinder under Federal Rule of Criminal Procedure 14. The requested severance was therefore properly denied.

III. Trial Errors

Throughout the trial, there were relatively few rulings adverse to the defense, and most of those had to do with the counts as to which the defendant was acquitted. The defendant has, however, pressed a few objections to the Court's charge.

First, it is argued that the Court erred in its instructions to the jury concerning the credibility of testimony given under a grant of immunity. Preliminarily, it should be noted that immunized testimony was not involved in Court IX (indeed, in the course of cross-examining Mr. Sweeten, defense counsel used him as a character witness for the defense), and that the testimony of Mr. Salkind in support of Count X was substantially corroborated by other, non-immunized, evidence (including, to some extent, the testimony of the defendant himself). In short, it is clear that the jury refused to convict the defendant of any charge which was based principally upon immunized testimony. It

is therefore clear that, even if error had been committed in the immunity instruction, it would not justify a retrial.

But I am not persuaded that the charge was erroneous, in the context of this trial. Abrams, the parents who paid the bribes, and Mr. Salkind, all testified under grants of immunity. Of these, only Abrams and Salkind implicated the defendant in any way.

As noted above, Abrams' credibility was suspect not only because of the grant of immunity, but also because of his conviction for perjury, and his repeated admissions to other instances of lying under oath, and to other crimes as well. A Government witness who was friendly to the defendant characterized Mr. Salkind as a "disreputable man-about-town," a characterization which Salkind's own admissions from the witness stand did much to substantiate.

Needless to say, defendant's capable counsel, in his closing address, very effectively capitalized upon these weaknesses in the Government's case. Counsel for the Government countered with the argument that, after being granted immunity, the witnesses had no motive to lie in order to protect themselves.

In the course of the charge, after giving the usual instructions on credibility (demeanor, interests, motive, seeming probability, corroboration, etc.) I cautioned the jury about the need to scrutinize carefully the testimony of persons previously convicted of perjury. I then pointed out that several witnesses had testified under a grant of immunity, and stated that "that, too, presents special considerations for you to take into account." I thereupon explained the consequences to the witness of a grant of immunity; noted that "it can be argued" that such a witness is free to tell the truth without fear of repercussions, and that this additional freedom might enhance the credibility of such a witness; but also noted that such a witness might have a motive "to ingratiate himself with the authorities or to curry favor with them, and this motivation may cause you to regard his testimony as unreliable;" and also pointed

out that a grant of immunity would weigh more heavily against the credibility of a witness "if you should conclude that immunity was granted only in exchange for an agreement in advance to testify against named individuals," and less heavily if there was no such understanding. I concluded by pointing out that "how those factors should be weighed and what conclusions you reach are entirely up to you."

It should be noted at this point that, except for the reference to the Government's argument in support of credibility of immunized witnesses, the charge did not differ substantially from that requested by the defendant (omitting some of the more extravagant and colorful language):

> "I charge you that immunized witnesses are often influenced in their testimony by strong motives of self-interest and self-protection. It is therefore incumbent upon you to look carefully into the secret motive that might actuate an evil mind to draw in and victimize the innocent . . . If you believe from the evidence that any of these people were induced to testify in this case by any promise of immunity or that any hope was entertained by him that he would be benefitted or advantaged by implicating the defendant in the crime charged, you must take that fact into consideration in determining what weight should be given to the testimony, closely scrutinize it, and, unless you can reconcile it with the truth, completely reject it." (Defendant's requested Point No. 1)

In retrospect, the language employed by the Court in reviewing the various arguments on the immunity question could no doubt be improved upon. Nevertheless, I believe the charge was sufficient to alert the jury to the special considerations applicable in evaluating the credibility of immunized testimony, particularly in view of counsel's extensive arguments on that subject. That the jury

properly understood the need to scrutinize the testimony of Abrams and Salkind very carefully before accepting it as credible is borne out by the fact that the jury appears to have rejected all of the testimony of Abrams and Salkind, except when it was corroborated by untainted evidence (including, to a large extent, the testimony of the defendant himself, as mentioned above).

A second claim is that, having instructed the jury that, if they believed the defendant's testimony, they must acquit on all counts with the possible exception of Count IX, I refused to give an unqualified instruction to that effect with respect to Count IX.

As to the first eight counts, the defendant testified unequivocally that he had never received any money from Abrams or anyone else. As to the tenth count, the defendant testified unequivocally that he had never requested or urged Mr. Salkind to withhold any true testimony from the Grand Jury. Therefore, as to those counts, the defendant was entitled to, and received, an unqualified instruction that if the jury believed his testimony they must acquit.

As to Count IX, however, the defendant's testimony was not so clearcut, and an unqualified instruction to acquit if they accepted the defendant's testimony could have been misleading. It is true that, in the course of his testimony, the defendant stated that he did not actually intend to request Mr. Sweeten to destroy the Braunstein letter, although he admitted requesting the destruction of his letters to the Osteopathic College. On the other hand, he also testified that it would have been reasonable for Mr. Sweeten to interpret what he said and did as a request to destroy the letter. He further stated that he did not know what he would have told Mr. Sweeten, had he known for certain that the letter existed. And finally, he sought to explain his conduct as motivated by a desire to shield his family from adverse publicity, and by his panic at being blackmailed by Abrams.

As discussed with counsel in chambers at the time, I was concerned that an overly broad instruction, to acquit if they believed the defendant, might be interpreted by the jury as meaning that they should acquit if they found that the defendant was motivated by a desire to protect his family, or acted in panic. There was also the risk of misleading the jury into believing that only an express verbal communication of the request to Mr. Sweeten would suffice.

Accordingly, with respect to the ninth count, the jury was told that it was a question of how they interpreted the defendant's testimony. The jury was specifically told that they must acquit unless they found beyond a reasonable doubt that the defendant did communicate to Mr. Sweeten a request to remove and destroy the letter, that he acted willfully and intentionally, and that he acted corruptly, for the purpose of preventing the letter from coming to the attention of the Grand Jury. I am persuaded that no error was committed.

The defendant also argues that the Court misconstrued the defendant's testimony with regard to Count IX. I am not aware of any such error, but there would be no grounds for present complaint in any event, since (1) the jury was expressly reminded to accept their own recollection of the testimony, and (2) at the jury's request, all of the testimony of Mr. Sweeten and of the defendant on this subject was reread to the jury in the course of their deliberations.

Additional errors are referred to in the defendant's Motion for a New Trial, but were not pressed at oral argument, and may have been abandoned. In any event, they are clearly without merit. In calling the jury's attention to the two principal factual issues (did the defendant receive bribes, and did the defendant corruptly attempt to obstruct justice?), I expressly reiterated the necessity of proof of each essential element of each crime beyond a reasonable doubt. In summarizing the principal issues

upon which the testimony was in conflict, I clearly did not alter the Government's burden of proof. And I believe it was proper to charge the jury that they could properly convict on Counts IX and X if they concluded beyond a reasonable doubt that the defendant acted corruptly in attempting to impede the Grand Jury's investigation; and to refuse to charge that this must have been his "principal" motivation. The case cited by the defendant in support of the latter proposition, *U.S. v. Baker*, 494 F.2d 1262 (6th Cir. 1974), simply does not support the defendant's argument.

In summary, I am satisfied that the defendant received a fair trial, and that there is no valid reason to disturb the jury's verdict.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1866

UNITED STATES OF AMERICA

v.

FINEMAN, HERBERT, *Appellant*

(D.C. Criminal No. 77-36-1)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, GIBBONS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 10, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 13, 1977, be, and the same is hereby affirmed.

ATTEST

/s/
Clerk

February 1, 1978

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE THIRD CIRCUIT

No. 77-1866

UNITED STATES OF AMERICA

v.

FINEMAN, HERBERT, *Appellant*

(D.C. Crim. No. 77-36-1)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued January 10, 1978
Before BIGGS, GIBBONS and WEIS, *Circuit Judges*

David W. Marston, United States Attorney
Walter S. Batty, Jr., Assistant United States Attorney, Chief, Appellate Section
Alan M. Lieberman, Assistant United States Attorney
James D. Coleman, Assistant United States Attorney
3310 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106
Attorneys for Appellee

Howard Gittis, Esquire
Mark A. Aronchik, Esquire
Barbara E. Etkind, Esquire
Wolf, Block Schorr & Solis-Cohen
12th Floor Packard Building
Philadelphia, Pennsylvania 19102
Attorneys for Appellant

OPINION OF THE COURT

(Filed February 1, 1978)

GIBBONS, *Circuit Judge*

Herbert Fineman was convicted in the District Court on two counts of a ten-count indictment for obstructing justice in violation of 18 U.S.C. § 1503. The jury found that Fineman had caused the destruction of a letter in the University of Pennsylvania's files (Count IX) and had urged a potential grand jury witness to withhold certain testimony (Count X). On his appeal from the judgment of sentence, Fineman urges a number of grounds for reversal. Since we find none of them meritorious, we affirm the judgment below.

Fineman, the former Speaker of the House of Representatives of the Pennsylvania General Assembly, was charged in the January 28, 1977, indictment with violations of the Racketeer Influenced and Corrupt Organizations Statute, 18 U.S.C. § 1962(c), conspiracy, mail fraud, interference with a federal investigation, and obstruction of justice. All of the counts related to the alleged receipt of bribes for the use of his influence in obtaining favorable action upon applications for admission to certain graduate schools of state-supported universities. The trial began on May 9, 1977. Two of the original ten counts were dismissed at the end of the government's case. On May 20, 1977, the

jury found Fineman not guilty on six additional counts, but guilty on two counts of obstructing justice. The counts on which he was acquitted involved a direct contradiction between Fineman's testimony and that of the Government's chief witness, Martin Abrams. The verdict suggests that the jury did not believe Abrams' testimony. Although Abrams also testified on Count IX, the government's case on Counts IX and X depended primarily on the testimony of other witnesses, as to only one of whom was there a material contradiction in Fineman's testimony.

Count IX charged that when Fineman became aware of the grand jury investigation and in particular of a possible inquiry about a student named Braunstein, he asked his friend, E. Craig Sweeten, the Vice-President of the University of Pennsylvania, to remove from the veterinary school's files a letter written on Fineman's stationery recommending Braunstein for admission. That count also charged that Fineman acted with the intention of obstructing the grand jury investigation. Sweeten testified to a conversation in which Fineman asked him to cause the Braunstein letter to be removed or disappear. In his testimony Fineman did not deny that he spoke with Sweeten about the letter. But his version was that his office had no record of the Braunstein letter mentioned by Abrams, whom he accused of attempted blackmail. Accordingly, Fineman testified that his conversation with Sweeten was designed merely to find out if such a letter existed. Fineman admitted, however, that, because of his anguish over Abrams' blackmail attempt, Sweeten might have received from his voice, words, and expression the unintended impression that Fineman wanted the letter destroyed. Fineman denied any such desire as well as any thought of withholding evidence from the grand jury.

Fineman's first contention is that the District Court erred in its charge to the jury with regard to the specific intention required to convict him on Count IX. As applied to that count, 18 U.S.C. § 1503 requires that Fineman have corruptly intended to obstruct the due administration of

justice by concealing the Braunstein letter from the grand jury. Fineman's testimony put that specific intention requirement in issue in two ways. First, Fineman denied intending to convey to Sweeten any interest in having the letter destroyed. Secondly and in part alternatively, he denied having any concern with the grand jury investigation. Thus, even if the jury had believed that Sweeten received a correct impression as to Fineman's desire to have the letter destroyed, it should still have acquitted the defendant if it believed that his concern was over Abrams' blackmail attempt and not over the grand jury investigation. Fineman contends that in its charge on Count IX the Court improperly misled the jury on his separate defense theories. On the other seven counts the Court charged in straightforward language that if the jury believed Fineman, it should acquit him. The charge on Count IX is quoted in the margin.[1] Fineman urges that, in contrast with

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1. The trial court charged the jury on Count IX as follows:

The ninth count charges that the defendant obstructed justice on or about August 31, 1976, by urging and causing Mr. Sweeten to cause the destruction of the Braunstein letter in the files of the School of Veterinary Medicine, University of Pennsylvania.

* * * * *

All of these charges are brought under a statute which makes it a criminal offense whenever—the offense is committed by whoever corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice. You will notice that can be committed either by the use of force or corruptly.

So that in order to convict under the obstruction-of-justice charge in each case you must be satisfied beyond a reasonable doubt that the defendant did corruptly influence or attempt to influence, obstruct, or impede the due administration of justice.

That means that several things must be found beyond a reasonable doubt before you can convict. You must find, first of all, that there was a duly impaneled grand jury and that the grand

the charges on the remaining counts, the charge on Count IX did not say unequivocally: "If you believe Fineman, you

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Note 1—*Continued*

jury was duly impaneled by law to investigate into possible violations of federal criminal laws.

* * * * *

In addition to those facts, you must be satisfied beyond a reasonable doubt that the defendant knew of the existence of the grand jury and knew that the grand jury was investigating or inquiring into matters relating to graduate-school admissions; and you must further be satisfied beyond a reasonable doubt that with that knowledge the defendant corruptly sought to interfere either with witnesses appearing before the grand jury or with information to be supplied by those witnesses.

* * * * *

Similarly, with respect to the ninth count, in order to convict under that count, you must be satisfied beyond a reasonable doubt that the defendant did request or communicate to Mr. Sweeten a request that the Braunstein letter be removed from the files with the purpose of preventing it from coming to the attention of the grand jury.

* * * * *

Now, I am going to try to make a fine distinction with respect to certain of the counts in this case. Let me just be very emphatic by saying if you accept the testimony of the defendant, if you believe that he is telling the truth, then you should acquit the defendant as to all of the counts, all the counts, all the charges included in the first count, second count, third count, fourth count, and fifth count. Also if you accept the defendant's testimony you should acquit under the eighth count and the tenth count.

The only remaining issue, then, would be with respect to the ninth count which involved this alleged request of Mr. Sweeten to remove and destroy the Braunstein letter. You will recall that Mr. Sweeten testified that the defendant said this could be very embarrassing and actually requested him to remove the letter or cause it to be removed, if you accept that as the correct version of the conversation.

should acquit." He urges that the charge could be understood to mean: "Even if you believe that Fineman did not

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Note 1—*Continued*

If you find beyond a reasonable doubt that the defendant's motive in wanting to get that letter out of the file was a corrupt motive—that is to say, that it was done in whole or in part for the purpose of preventing that letter from coming to the attention of the grand jury which the defendant then knew was investigating in that general area—then you would have a right to return a verdict of guilty.

On the other hand, you will recall the defendant testified; and it is a question of how you interpret his testimony. If you accept it as being the correct version of what happened, he testified that he was in a panic and that he was very upset and he was concerned, to avoid publicity and avoid damage to his family if this letter should come to light.

The distinction that you would have to bear in mind here would be a distinction between the state of mind of the defendant in which he was not even thinking about the grand jury and was not in any way motivated by a desire to prevent this letter from coming to the attention of the grand jury on the one hand; and, on the other hand, if there were a combination of a desire to keep the matter from causing unfavorable publicity for himself and his family and also a desire to keep it from coming to the attention of the grand jury in that case you would be justified in finding a verdict of guilty.

But the point I am making is that a person's motives in committing a violation of the law are not controlling if, in fact, he committed the violation charged.

Now, the violation charged in this case is corruptly attempting to obstruct justice by preventing the grand jury from getting information. If you find the defendant acted corruptly, the fact he may have acted in part because he was in panic and in part a desire to protect his family would not be a defense if he acted to prevent it from coming to the grand jury.

On the other hand, if he was not even thinking in terms of the grand jury, had given no thought to the grand jury, in short he did not have a state of mind which can properly be described as acting corruptly, then you would be entitled to render a verdict of not guilty. . . .

App. at 1529a-1530a, 1531a, 1540a-1543a (emphasis added).

intend to convey the impression to Sweeten that he wanted the letter destroyed, if Sweeten received such an impression, you may convict." However, we think that the Court's charge on Count IX cannot be so understood. That charge required a finding that Fineman intended to conceal the letter from the federal grand jury. Such a finding necessarily included a finding that Fineman intended to convey to Sweeten the impression that the letter should be removed or destroyed. Consequently, we reject the appellant's first contention.

Fineman next contends that the District Court erred in that part of its charge on Count X relating to the effect of a grant of immunity on a witness' credibility. Count X charged that in a telephone conversation with Harold Salkind, a consultant to the President of the Philadelphia College of Osteopathic Medicine, Fineman asked Salkind to withhold certain testimony from the grand jury. In contrast with Count IX, there was a sharp conflict between Fineman's testimony that no such conversation ever took place and the testimony of Salkind, who was testifying under a grant of immunity. In his closing argument Fineman's counsel referred to the grant of immunity and to Salkind's admission that he was a fixer of medical school admissions. That portion of the Court's charge dealing with witnesses testifying pursuant to grants of immunity is quoted in the margin.[2] Fineman urges that in effect this

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2. You also have in this case the testimony of a number of witnesses who testified under grant of immunity. And that, too, presents special considerations for you to take into account.

Now, I want to make clear when a witness is granted immunity what that means is simply that what the witness says can not be used against him in any criminal proceeding. It means that he can not be prosecuted for crimes that he tells about on the basis of testimony that he gives.

The grant of immunity puts a witness in a special situation. You can make arguments both ways as to which way that operates.

charge enhanced Salkind's credibility. We do not agree. Courts have recognized that in some circumstances the possibility of a grant of immunity provides an unscrupulous witness with "an incentive to prevarication." *United States v. Leonard*, 494 F.2d 955, 961 n. 11 (D.C. Cir. 1974). Taken in its entirety, the Court's charge adequately presented that issue to the jury. Abrams was also granted immunity and his testimony was rejected. We find no error in the manner in which the question of the credibility of immunized was given to the jury.

Third, Fineman contends that the District Court erred in denying his motion to sever Count X from the other

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Note 2—*Continued*

On the one hand a witness who has been granted immunity is free from any concern that he will be prosecuted for what he says; and, therefore, it can be argued that he is completely free to tell the absolute truth without having any repercussions of any kind. And this additional freedom enhances the credibility of such a witness.

The argument can be made that a witness under grant of immunity is not immune from being punished for perjury if he lies in giving his testimony under the grant of immunity.

Therefore, the argument can be made since the witness under grant of immunity is free to tell the truth, and the only problem he would have would be that if he lied he might be prosecuted for perjury, that those factors tend to enhance the credibility of a witness testifying under grant of immunity.

On the other hand, a witness may testify under a grant of immunity out of sole motive to ingratiate himself with the authorities or to curry favor with them; and this motivation may cause you to regard his testimony as unreliable.

In short, I am pointing out simply that a person testifying under grant of immunity is in a somewhat different situation than an ordinary witness; and it is entirely up to you how you size up that situation to decide whether or not it enhances or diminishes the credibility of such a witness. It is entirely up to you to evaluate.

App. 1534a-35a (emphasis supplied).

charges. Fineman argues both that Count X was misjoined under Rule 8(a) of the Federal Rules of Criminal Procedure and that, because joinder was prejudicial, Rule 14 required a severance. We disagree with both of these arguments. Count X was joined with Count IX, which also charged a violation of 18 U.S.C. § 1503. Thus, the offenses charged in Counts IX and X were similar. Moreover, on the government's theory the charges all involved a common scheme or plan. Accordingly, there was no misjoinder under Rule 8(a). In reviewing the Court's denial of the appellant's Rule 14 severance motion, we must ask whether the Court abused its discretion in denying the motion. *United States v. Catena*, 500 F.2d 1319, 1326 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974). Most, if not all, of the testimony on the other counts would in any event have been admissible on Count X to show Fineman's motive for obstructing justice. *See United States v. Bradwell*, 388 F.2d 619, 621 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968). Thus, the likelihood of prejudice from joinder was remote. The District Court's ruling denying separate trials cannot be held to be an abuse of discretion.

Finally, Fineman urges that since evidence was admitted on eight counts of which he was acquitted and since that evidence could have tainted the jury verdicts on Counts IX and X, the interests of justice require that he be given a new trial on the latter two counts. In support of this argument, Fineman relies principally on *United States v. House*, 524 F.2d 1035 (3d Cir. 1976). In that case evidence of wilfulness was presented to the jury on counts which were legally insufficient, and the jury convicted on those counts. It was impossible to tell whether the improper submission of those counts tainted the jury's deliberations on the one count which was legally sufficient. Accordingly, we granted a new trial. Here, by contrast, the six counts on which the jury found Fineman not guilty were properly submitted to the jury. Moreover, we know from the verdict that the jury carefully separated the evidence on those counts from the evidence on Counts IX and X. Under these

circumstances and on this record, no new trial is required.
The judgment appealed from will be affirmed.

To the Clerk of the Court:
Please file the foregoing opinion.

JOHN J. GIBBONS
Circuit Judge

APPENDIX D

Charge of the Court

• • •

[1534a] You also have in this case the testimony of a number of witnesses who testified under grant of immunity. And that, too, presents special considerations for you to take into account.

Now, I want to make clear when a witness is granted immunity what that means is simply that what the witness says can not be used against him in any criminal proceeding. It means that he can not be prosecuted for crimes that he tells about on the basis of testimony that he gives.

The grant of immunity puts a witness in a special situation. You can make arguments both ways as to which way that operates.

On the one hand a witness who has been granted immunity is free from any concern that he will be prosecuted for what he says; and, therefore, it can be argued that he is completely free to tell the absolute truth without having any repercussions of any kind. And this additional freedom enhances the credibility of such a witness.

[1535a] The argument can be made that a witness under grant of immunity is not immune from being punished for perjury if he lies in giving his testimony under the grant of immunity.

Therefore, the argument can be made since the witness under grant of immunity is free to tell the truth, and the only problem he would have would be that if he lied he might be prosecuted for perjury, that those factors tend to enhance the credibility of a witness testifying under grant of immunity.

On the other hand, a witness may testify under a grant of immunity out of some motive to ingratiate himself with the authorities or to curry favor with them; and this motivation may cause you to regard his testimony as unreliable.

In short, I am pointing out simply that a person testifying under grant of immunity is in a somewhat different

situation than an ordinary witness; and it is entirely up to you how you size up that situation to decide whether or not it enhances or diminishes the credibility of such a witness. It is entirely up to you to evaluate.

It is my recollection in this case—I will leave it to your recollection—but I do not recall any evidence in this case to the effect that any witness was granted immunity in exchange for his willingness to testify in a particular way. None of the witnesses who testified under grant of immunity said anything more, as I recall, than that they were [1536a] granted immunity in exchange for their agreement to testify truthfully. I do not recall any evidence they were granted immunity in order to testify as to a particular individual or as to particular events, but I will leave that entirely up to you.

I would simply point out that if you should conclude that immunity was granted only in exchange for an agreement in advance to testify against named individuals that would adversely affect the credibility of such a witness; whereas if there is no such agreement then that factor would not weigh as heavily.

To sum it up as best I can, I want to emphasize what I am trying to do is to point out some of the factors which you would have the right to consider in evaluating the testimony of immunized witnesses and how those factors should be weighed and what conclusions you reach are entirely up to you.

• • •

APPENDIX E

Charge of the Court

[1540a] Now, I am going to try to make a fine distinction with respect to certain of the counts in this case. Let me just be very emphatic by saying if you accept the testimony of the [1541a] defendant, if you believe that he is telling the truth, then you should acquit the defendant as to all of the counts, all the charges included in the first count, second count, third count, fourth count, and fifth count. Also if you accept the defendant's testimony you should acquit under the eighth count and the tenth count.

The only remaining issue, then, would be with respect to the ninth count which involved this alleged request of Mr. Sweeten to remove and destroy the Braunstein letter. You will recall that Mr. Sweeten testified that the defendant said this could be very embarrassing and actually requested him to remove the letter or cause it to be removed, if you accept that as the correct version of the conversation.

If you find beyond a reasonable doubt that the defendant's motive in wanting to get that letter out of the file was a corrupt motive—that is to say, that it was done in whole or in part for the purpose of preventing that letter from coming to the attention of the grand jury which the defendant then knew was investigating in that general area —then you would have a right to return a verdict of guilty.

On the other hand, you will recall the defendant testified; and it is a question of how you interpret his testimony. If you accept it as being the correct version of what happened, he testified that he was in a panic and that he was very upset and he was concerned, to avoid publicity and avoid [1542a] damage to his family if this letter should come to light.

The distinction that you would have to bear in mind here would be a distinction between the state of mind of the defendant in which he was not even thinking about the grand jury and was not in any way motivated by a desire

to prevent this letter from coming to the attention of the grand jury on the one hand; and, on the other hand, if there were a combination of a desire to keep the matter from causing unfavorable publicity for himself and his family and also a desire to keep it from coming to the attention of the grand jury in that case you would be justified in finding a verdict of guilty.

But the point I am making is that a person's motives in committing a violation of the law are not controlling if, in fact, he committed the violation charged.

Now, the violation charged in this case is corruptly attempting to obstruct justice by preventing the grand jury from getting information or trying to prevent the grand jury from getting information. If you find the defendant acted corruptly, the fact he may have acted in part because he was in panic and in part a desire to protect his family would not be a defense if he acted to prevent it from coming to the grand jury.

On the other hand, if he was not even thinking in terms of the grand jury, had given no thought to the grand jury, in short he did not have a state of mind which can properly be described as acting corruptly, then you would be entitled to [1543a] render a verdict of not guilty. Assuming that you find that request was made or communicated by the defendant—of course, unless you find that the defendant did communicate to Mr. Sweeten a request that the letter be removed and destroyed—your verdict must be not guilty on that count in any event.

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Supreme Court, U. S.
FILED
MAY 17 1978
MICHAEL RODAK, JR., CLERK

No. 77-1398

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
CAROLYN GAINES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The unpublished opinion of the court of appeals (Pet. App. C) is noted at 571 F. 2d 572. The opinion of the district court (Pet. App. A) is reported at 434 F. Supp. 197.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1978 (Pet. App. B), and a petition for rehearing was denied on March 2, 1978. The petition for a writ of certiorari was filed on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury with regard to the c redibility of immunized witnesses.

2. Whether the distr ct court properly instructed the jury on the intent required for the crime of obstruction of justice.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on two counts of obstruction of justice, in violation of 18 U.S.C. 1503. He was sentenced to two years' imprisonment and a fine of $5,000 on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A26-A34).

The evidence adduced at trial is set forth in the opinion of the district court (Pet. App. A3-A9). Briefly, it showed that in 1976 petitioner, then Speaker of the House of Representatives of the Pennsylvania General Assembly, became aware of a federal grand jury investigation into his alleged receipt of bribes in return for his influence in obtaining favorable action upon applications for admission to certain graduate schools of state-supported universities. The investigation had focused in particular on his having undertaken such action on behalf of Michael Braunstein, an applicant for admission to the School of Veterinary Medicine of the University of Pennsylvania. In August 1976, petitioner contacted E. Craig Sweeten, the vice-president of the university, and asked Sweeten to remove from the veterinary school's files a letter of recommendation petitioner had written for Braunstein (*id.* at A5). This incident formed the basis for Count IX of the indictment. In addition, in November and December 1976, petitioner urged Harold Salkind, a

consultant to the president of the Philadelphia College of Osteopathic Medicine, to withhold testimony from the grand jury about petitioner's contacts with him concerning applications to the college by various students (*id.* at A5-A6). These actions formed the basis for Count X.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the district court erred in not instructing the jury that the immunized testimony given by Harold Salkind should be viewed with caution or suspicion. As the court of appeals found, however, "[t]aken in its entirety, the Court's charge adequately presented that issue to the jury" (Pet. App. A32). The charge clearly pointed out the special interest or bias that a witness may have as a result of being granted immunity, since "a witness may testify under a grant of immunity out of some[1] motive to ingratiate himself with the authorities or to curry favor with them." The jury also was reminded that "this motivation may cause you to regard [an immunized witness's] testimony as unreliable" (*id.* at A32 n. 2; A37). Furthermore, petitioner testified that Salkind told him that he had to satisfy the F.B.I. by implicating "all kinds of people" because that was the only way he could get immunity (C.A. App. 1309a-1311a),[2] and petitioner's counsel stressed in his summation to the jury that the witnesses who had been granted immunity were pressured and intimidated into testifying against petitioner (C.A. App. 1461a-1462a). Hence, the jury was well aware that the testimony of an immunized witness should be viewed with caution. In these circumstances, the trial judge did not abuse his

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[1]The opinion of the court of appeals inadvertently transposes "some" to "sole." Compare Pet. App. A32 n. 2 with *id.* at A37.

[2]"C.A. App." refers to the appendix in the court of appeals.

discretion by balancing the charge with the statement that immunity may also enhance a witness's credibility by freeing him from concern that he will be prosecuted for crimes other than perjury. See *United States* v. *Abraham*, 541 F. 2d 1234, 1241 (C.A. 7), certiorari denied, 429 U.S. 1102; cf. *United States* v. *Lee*, 506 F. 2d 111, 118 (C.A. D.C.), certiorari denied, 421 U.S. 1002.[3]

Contrary to petitioner's contention (Pet. 7-8), this balanced instruction does not conflict with *United States* v. *DeLoach*, 530 F. 2d 990, 994 n.5 (C.A. D.C.), certiorari denied, 426 U.S. 909, *United States* v. *Rajewski*, 526 F. 2d 149, 160 (C.A. 7), certiorari denied, 426 U.S. 908, or *United States* v. *Demopoulos*, 506 F. 2d 1171, 1179 (C.A. 7), certiorari denied, 420 U.S. 991. Although those decisions upheld instructions warning jurors that a grant of immunity may detract from a witness's credibility, they do not suggest that it is improper to instruct the jury that immunity may also encourage a witness to be truthful. Indeed, since instructions must be tailored to the facts of each particular case, the trial judge's statements were particularly appropriate here, in light of petitioner's repeated allegations that Salkind falsely testified favorably to the government in order to obtain immunity. See *United States* v. *Abraham*, *supra*, 541 F. 2d at 1241.[4]

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[3]The judge ended his instruction by telling the jury that "it is entirely up to you how you size up that situation to decide whether or not [the immunity grant] enhances or diminishes the credibility of such a witness" (Pet. App. A32 n. 2).

[4]There is no merit to petitioner's related claim (Pet. 6) that the district court erred in commenting that it did not recall any evidence that any witness had been granted immunity in exchange for his willingness to testify in a particular way. Although petitioner testified that Salkind had stated that he was testifying to save "his own skin" (C.A. App. 1310a), there is a broad difference between truthful testimony given in order to avoid prosecution and false testimony given in exchange for immunity. Witnesses who testify under a grant of immunity frequently do so in order to avoid prosecution.

In any event, the record in this case clearly reflects that the jury's verdict was not based upon testimony given under a grant of immunity. As the district court observed (Pet. App. A12):

> [I]t should be noted that immunized testimony was not involved in Count IX (indeed, in the course of cross-examining Mr. Sweeten, defense counsel used him as a character witness for the defense), and that the testimony of Mr. Salkind in support of Count X was substantially corroborated by other, non-immunized, evidence (including, to some extent, the testimony of the defendant himself). In short, it is clear that the jury refused to convict the defendant of any charge which was based principally upon immunized testimony.

2. Petitioner contends (Pet. 11-15) that the district court failed to instruct the jury under Count IX that specific intent is an element of the crime of obstruction of justice. In support of this claim, petitioner asserts that the trial judge told the jury that it could convict petitioner even if it believed his testimony that he did not intend to convey the impression to Sweeten that he wanted the Braunstein letter of recommendation to be destroyed. Read in context, however, the instruction carried no such meaning. As the court of appeals correctly held (Pet. App. A31), the instructions clearly required a finding that petitioner specifically intended to obstruct justice by concealing the letter from the grand jury. The district court first charged the jury (C.A. App. 1529a, 1530a, 1531a):

> So that in order to convict under the obstruction-of-justice charge in each case you must be satisfied beyond a reasonable doubt that the defendant did corruptly influence or attempt to influence, obstruct, or impede the due administration of justice.
>
> * * * * *

In addition to those facts, you must be satisfied beyond a reasonable doubt that the defendant knew of the existence of the grand jury and knew that the grant jury was investigating or inquiring into matters relating to graduate-school admissions; and you must further be satisfied beyond a reasonable doubt that with that knowledge the defendant corruptly sought to interfere either with witnesses appearing before the grand jury or with information to be supplied by those witnesses.

* * * * *

Similarly, with respect to the ninth count, in order to convict under that count, you must be satisfied beyond a reasonable doubt that the defendant did request or communicate to Mr. Sweeten a request that the Braunstein letter be removed from the files with the purpose of preventing it from coming to the attention of the grand jury.

After making the statement about which petitioner complains, the court further instructed the jury (C.A. App. 1541a, 1542a-1543a):

> If you find beyond a reasonable doubt that the defendant's motive in wanting to get that letter out of the file was a corrupt motive—that is to say, that it was done in whole or in part for the purpose of preventing that letter from coming to the attention of the grand jury which the defendant then knew was investigating in that general area—then you would have a right to return a verdict of guilty.
>
> * * * * *
>
> Now, the violation charged in this case is corruptly attempting to obstruct justice by preventing the grand jury from getting information or trying to prevent the grand jury from getting information. If you find the defendant acted corruptly, the fact that he may have acted in part because he was in panic and in part a desire to protect his family would not be a defense if he acted to prevent it from coming to the grand jury.
>
> On the other hand, if he was not even thinking in terms of the grand jury, had given no thought to the grand jury, in short he did not have a state of mind which can properly be described as acting corruptly, then you would be entitled to render a verdict of not guilty. * * *

Thus, in the words of the court of appeals (Pet. App. A31), the district court's instruction, when viewed as a whole, "required a finding that [petitioner] intended to conceal the letter from the federal grand jury. Such a finding necessarily included a finding that [petitioner] intended to convey to Sweeten the impression that the letter should be removed or destroyed." The trial judge's qualifying language, far from removing the issue of specific intent from the case, merely informed the jury, correctly, that petitioner would not be absolved of liability for obstructing the grand jury even if the jury found that petitioner caused the letter to be removed or destroyed in part to avoid embarrassment to his family.[5]

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[5]Since petitioner received identical concurrent sentences on Counts IX and X and each of his claims relates only to one of the counts, the Court need not grant review if it considers either of his contentions to be meritless. See *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JOSEPH S. DAVIES, JR.,
CAROLYN GAINES,
Attorneys.

MAY 1978.

DOJ-1978-05